Supreme Court, U. S.
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79-1755

IN THE

Supreme Court of the United States

OCTOBER TERM: 1980

JACK ANTHONY GULLO,
Petitioner,

v.

BRUCE E. LAMBERT
and
MIRIAM ANNE HIRST,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ARLINGTON COUNTY OF THE SEVENTEENTH JUDICIAL CIRCUIT OF THE STATE OF VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ARLINGTON COUNTY OF THE SEVENTEENTH JUDICIAL CIRCUIT OF THE STATE OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the final order of the circuit court of Arlington County of the Seventeenth Judicial Circuit of the State of Virginia entered in the above entitled cause on May 9, 1979.

OPINIONS BELOW

The opinion of the Circuit Court of Arlington County, Virginia, is unreported and is printed in Appendix B, infra, pages 3a - 7a.

JURISDICTION

Final order of the circuit court of Arlington County, Virginia, of the seventeenth judicial circuit of the State of Virginia granting summary judgment to respondents was entered on May 9, 1979, Appendix C, infra, pages 8a - 9a. A timely petition for writ of error to the Supreme Court of Virginia at Richmond for a review of the final order was refused on February 20, 1980, Appendix D, infra, page 10a.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I

Whether the final order of the Circuit Court of Arlington County, Virginia, entered May 9, 1979, denies Petitioner the equal protection of the law and deprives him of his property without the due process of the law in violation of the Fourteenth Amendment of the Constitution of the United States and Article 1 Section 11 of the Constitution of the State of Virginia by allowing respondents to use their fraudulent and perjured attachment petition to attach, take, and sell petitioner's property to his loss and injury?

II

Whether the attorneys and judges in this case violated their duties to the court and to the petitioner under the Virginia Code of Professional Responsibility and Canons of Judicial Ethics in allowing respondents to use their fraudulent and perjured attachment petition to attach, take, and sell petitioner's property to his loss and injury?

CONSTITUTIONAL PROVISIONS INVOLVED

1. *Constitution of the United States — Amendment XIV Section 1:*

> "Nor shall any State deprive any person of . . . property without the due process of law, nor deny to any person . . . the equal protection of the law."

2. *Constitution of the State of Virginia Article 1 Section ii:*

> "THAT NO PERSON SHALL BE DEPRIVED OF HIS . . . PROPERTY without due process of law. . . ."

STATEMENT

On June 25, 1976, the Circuit Court of Fairfax County, Virginia, entered the following final order:

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MIRIAM ANNE HIRST Plaintiff. vs.	:	LAW NO. 10501
JACK ANTHONY GULLO and JOE S. GULLO Defendants and	:	and ATTACHMENT PETITION LAW NO. 11441
QUIN S. ELSON, SPECIAL COMMISSIONER OF SALE IN DIVORCE DECREE, CHANCERY No. 15253 CO-Defendnat.	:	

ORDER

The above entitled actions came on to be heard on the merits without a jury this 20th day of May, 1976, upon the Motion For Judgment based on an action for Malicious Prosecution and the Attachment Petition together with the Writ of Attachment issued and served upon CO-Defendant on December 21, 1962, of the Plaintiff, Miriam Anne Hirst; upon the Answer and Grounds of Defense of the Defendant, Joe S. Gullo; upon Defendants' Motion To Strike out all plaintiff's evidence at the conclusion of taking of the plaintiff's evidence in chief; and after argument thereon in open court by counsel for both parties herein; and thereupon, upon consideration thereof, it is, by the Court, this 25th day of June, 1976,

ORDERED, ADJUDGED AND DECREED:

1. That said motion be and the same is hereby sustained, and that Plaintiff's Motion For Judgment, Attachment Petition, and Writ of Attachment be and the same are hereby dismissed.

2. That the lien on the property of Defendant, Jack Anthony Gullo, created by the said Writ of Attachment issued and served upon CO-Defendant on December 21, 1962, be and the same is hereby released.

3. And that Plaintiff's exception to the foregoing ruling of the Court is herein noted.

ORDER Entered: This 25th day of June, 1976.

/s/ Burch Millsap
Judge Burch Millsap

SEEN:

/s/ Joseph S. Gullo
Joseph S. Gullo, pro-se, and Attorney for Defendants

/s/ Bruce E. Lambert
Lambert and Lambert, Bruce E. Lambert, Attorney for Plaintiff

Quin S. Elson, Special Commissioner of Sale

Certified copies of the foregoing verified attachment petition, *Law No. 11441,* and writ of attachment are shown in Appendix E, infra, pages 11a - 13a and Appendix F. infra, pages 14a - 17a.

All questions of fact and law raised or that could have been raised on the trial of the foregoing *Attachment Petition Law No. 11441* and *Law Action No. 10501* were determined and decided by the foregoing final order entered June 25, 1976, heard on the merits on May 20, 1976, and are *res judicata;* 2 A Michie Jur. Attachment and Garnishment Sections 82, 85; Burke Pl. & Prac. 4th ed., Judgments, Res-Judicata, Section 357; Remedies For Wrongful Attachment Section 394; Civil Prosecution Section 145.

The sheriff's return shows it was executed on the verified attachment petition on December 21, 1962, by serving a true copy of the perjured verified attachment petition and writ of attachment on the CO-Defendant, Quin S. Elson in person, who then had possession and control of the attached property. Petitioner, a non-resident of the State of Virginia, had a legal right to an undivided one-

half (½) interest in the attached property, Va. Code Title 8.01 Section 550: Watson v Mose, 183 S.E. 428 (Va.), Guy v Guy, 172 S.E.2d 735 (1970), 210 Va. 536. Petitioner and Respondent Miriam Anne Hirst, were owners of the attached property, 7516 Walton Lane, Fairfax County, Virginia, and by statute became owners as tenants in common upon the entry of the divorce decree, Chancery No. 15253, on April 28, 1961, Gullo v. Gullo. Over petitioner's objections, the divorce decree names Quin S. Elson, Commissioner of Sale to sell the attached property, which it describes. Elson took possession and control of the attached property on about September 28, 1962, at the request of Respondent Bruce E. Lambert, attorney for Respondent Miriam Anne Hirst. Thereupon, respondents names Elson Co-Defendant in their fraudulent and perjured verified attachment petition.

On August 20, 1976, petitioner filed a timely Motion For Judgment *Law No. 18883* in the Circuit Court of Arlington County, Virginia, claiming damages for malicious prosecution, abuse of procee, and for attaching, taking, and selling petitioner's property illegally Va. Code Title 8.01 Sections 41 and 568, and without the due process of law by the use of their fraudulent and perjured verified attachment petition and writ of attachment. A copy of petitioner's Motion For Judgment Law No. 18883 is shown in Appendix G, infra, pages 18a - 22a, which in part reads:

> *paragraph 4* –
>
> "Thereafter in furtherance of defendants' design to recover the damages, $35,000.00, on the unfounded claim alleged in *Civil Action No. 10501*, Defendant Miriam Anne Hirst with the assistance, advice, and counselling of her attorney Defendant Bruce E. Lambert together drafted the *Attachment Petition Law No. 11441*, Miriam

Anne Hirst v Jack Anthony Gullo et-al and Co-Defendant Quin S. Elson, which was subscribed, sworn to and acknowledged on December 21, 1962, by Defendant Miriam Anne Hirst before her then attorney Defendant Bruce E. Lambert, a Notary Public. Thereupon Defendant Bruce E. Lambert knowing that the statements alleged in the *Attachment Petition Law No. 11441* were false, nevertheless did corruptly and illegally acknowledge the same as Notary Public to deprive plaintiff of his said property illegally."

paragraph 10 –

The actions of both defendants herein in drafting and filing the *Attachment Petition Law No. 11441* and in swearing out the attachment and causing the same to be levied against plaintiff's real property, 7516 Walton Lane, as alleged in this Motion For Judgment were malicious, without probable cause, wilful, illegal, contrary to law and by reason thereof plaintiff has been deprived of his real property,7516 Walton Lane, without any consideration and without the due process of law, and caused him great financial loss and suffer great humiliation, . . ."

Petitioner raised the question presented for review in this Petition For Writ of Certiorari in his Motion For Judgment, paragraph 10 above; and in his Motion For Rehearing, Appendix I, infra, pages 27a - 29a, and in his Petition for Writ of Error in The Supreme Court of Virginia. Petitioner alleged in his Motion For Judgment, paragraph 10 above, that he was deprived of his property without consideration and without the due process of the law (of the Constitution) by allowing respondents to use

their fraudulent and perjured attachment petition to attach and take his property.

The undisputed facts, which are admitted to be true by respondents, show respondents violated the Virginia Code Title 8.01 Section 537, which required that the Attachment Petition should be sworn to by the plaintiff or his agent, and may not be had unless a valid claim as defined in the Virginia Code is proven and one or more of the grounds specified in the Code is present, *Persinger v Edwin Associates, 230 S.E. 2d 460, (W.Va. 1976).* To evade the requirements of the Virginia Code in order to give the attachment petition the appearance of complying with the Virginia Code, respondents knowingly stated a false claim in their perjured attachment petition, Appendix E, infra, page 11a, which falsely states:

> "Jack Anthony Gullo . . . is justly and truly indebted to Miriam Anne Hirst in the sum of $35,000.000, which amount was due and payable December 20, 1960."

And knowingly further state a false ground for attachment that

> "Jack Anthony Gullo intends to remove the proceeds of the sale . . . of his (attached) property out of the State of Virginia. . ."

The court granted respondents' motion opposing petitioner's several motions to quash and dismiss the perjured attachment petition and writ of attachment.

On December 12, 1978, just before the trial by jury, respondents filed a Joint Motion For Summary Judgment, a copy of which is shown in Appendix H, infra, pages 23a -26a.

Judge Paul D. Brown denied petitioner's motion to

dismiss on grounds that all the issues of fact and law alleged in respondents' Joint Motion For Summary Judgment were determined and decided by the former final order entered June 25, 1976, supra, by the Circuit Court of Fairfax County, Virginia, *In Law Action No. 10501 and Attachment Petition Law No. 11441*, supra, and are res-judicata.

Judge Paul Brown rendered summary judgment in open court. On January 8, 1979, petitioner filed a timely notice and Motion for Rehearing, which in part is shown in Appendix I, infra, pages 27a - 29a. The facts and authorities in support of the claims upon which relief may be granted are stated in Petitioner's Motion For Rehearing.

On May 9, 1979, Judge Brown rendered and filed his written opinion, Appendix B, infra, pp. 3a - 7a, which is vauge, arbitrary, capricious, and contrary to the facts and law. By filing their Joint Motion For Summary Judgment, Appendix H, infra, pp. 23a - 26a, respondents admit all the material facts alleged in petitioner's Motion For Judgment, Law No. 18883, Appendix G, infra, pp. 18a - 22a are true.

The attorneys and judges whose names appear in the orders, opinion of Judge Paul Brown, pleadings, and motions in the record in this cause were aware that respondents knowingly made the false statements in their perjured attachment petition, that Lambert notarized the fraudulent and perjured attachment petition, and that respondents used the fraudulent and perjured verified attachment petition to attach, take, and sell petitioner's property to his loss and injury.

The attorneys and judges violated their duties to the court and to petitioner under the Code of Professional Responsibility and Canons of Judicial Ethics in allowing

respondents to attach and take petitioner's property by the use of fraud and perjury.

REASONS FOR GRANTING THE WRIT

On August 2, 1979, petitioner filed his Petition For Writ of Error in The Supreme Court of Virginia in which he states:

> "The trial court denies plaintiff a fair trial and the due process of law by allowing defendants to continue to practice perjury (citing Transcript Law No. 18883, 12/12/1978; Va. Code of Professional Responsibility, DR 7 - 102; 211 Va. 295, 345-346. 10/13/1970)"

On February 20, 1980, the Supreme Court of Virginia refused petitioner's Petition For Writ of Error, Appendix D, infra, page 10a.

Canons of Judicial Conduct For The State of Virginia, Canon 3 B (3), states:

> "A judge should take or initiate appropriate discipline measures against a lawyer for unprofessional conduct of which the judge may be aware. . ."

Not only did the judges fail to take the appropriate discipline measures but they also failed to secure petitioner a judicial trial in accordance with the due process of law, William v Freeland, 131 U.S. 405, 9 S. Ct. 763, affirming 19 W. Va. 599; denied him the equal protection of the law; denied him a just and fair trial, free from fraud and free from perjury; and allowed respondents to use a fraudulent

and perjured attachment petition to deprive petitioner of his property.

Further, the judges arbitrarily overlooked and ignored that in the State of Virginia, the policy of the law demands that judicial proceedings shall be fair and free from fraud, that witnesses shall be encouraged to tell the truth and that they be punished when they do not, Slayton v. Commonwealth, 38 S.E. 2d 485, 185 Va 371; Virginia Code Title 18.2 Sections 434 and 436.

The policy to secure petitioner and others like him a judicial trial in accordance with the due process of law is stated and guaranteed both by the Fourteenth Amendment of the United States Constitution and Article 1 Section 11 of the Constitution of the State of Virginia, both provide that no person shall be denied the equal protection of the law and deprived of his property without the due process of the law.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH S. GULLO
Counsel for Petitioner

April xx, 1980.

APPENDIX A

CONSTITUTION AND STATUTES INVOLVED

1. *Constitution of the United States Amendment XIV — Section 1 —*

> ". . . nor shall any State deprive any person of . . . property without the due process of the law, nor deny to any person . . . the equal protection of the law."

2. *Constitution of The State of Virginia Article 1 Section 11 —*

> "That no person shall be deprived of his . . . property without due process of law . . ."

3. *Virginia Code Title 8.01 Section 537 — Petition For Attachment —*

> "the petition shall . . . state a sum certain which the plaintiff is entitled to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable . . . The petition shall also set forth the existence of one or more grounds of attachment mentioned in Virginia code Title 8.01 Section 534 . . . . The petition shall be sworn to by the plaintiff or his agent . . ."

4. *Virginia Code Title 8.01 Section 41 — Wrongful Attachment —*

> "If property be . . . taken under any attachment sued out without good cause, the owner of said property may, in an action against the party suing out the . . . attachment recover damages for the wrongful . . . seizure or sale."

5. *Virginia Code Title 8.01 Section 568* –

"The court in which an attachment is pending, may . . . hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or that none of the grounds for attachment in Title 8.01 Section 534 exist, . . .

"When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant.

"In either case, he shall recover his costs, and damages for loss of use of his property, and there shall be an order for the restoration of the attached effects."

6. *Virginia Code Title 8.01 Section 550* –

"An attachment may be levied . . . on choses in action . . . by delivering a copy of the attachment to the person; having possession of the property belonging to him." (principal defendant – Petitioner had a legal right to an undivided one-half, ½, interest in the attached property in the possession and control of the CO-Defendant)

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

JACK ANTHONY GULLO Plaintiff	)	
v.	)	At Law No. 18883
BRUCE E. LAMBERT and MIRIAM A. HIRST Defendants	)	

OPINION

FROM: HONORABLE PAUL D. BROWN, Judge

TO: JOSEPH S. GULLO, Esquire, Counsel to Plaintiff
WILLIAM F. KREBS, Esquire, Counsel to Defendant Lambert
SANDRA S. ADAMS, Attorney at Law, Counsel to Defendant Hirst

PART I

The Court is called upon to rule on a Motion for Summary Judgment filed on the morning of the trial in behalf of the Defendants. The Motion is based upon the position that no property was levied upon in the Fairfax Malicious Prosecution suit, which suit is the basis of the suit here. The return of the Sheriff on the attachment shows service of a copy of the attachment upon Jack Anthony Gullo in person and upon "Quin S. Elson in person" on December

21, 1962. The return makes no reference to a levy upon land, nor does it give any description of land. Accordingly, for purposes of the Motion on the evidence before me, I find that no land was levied upon on that date by the Sheriff of Fairfax.

There remains, however, a question as to whether any "estate" was affected by service of the attachment upon Elson. While the return is upon Elson as an individual, the body of the paper which he received addresses him as Special Commissioner of Sale.

It is in this latter capacity that the Plaintiff Gullo contends he holds money. Gullo points to the fact that the Defendant Hirst, in her Answer alleges that the attachment occurred because it was thought funds were in the hands of Elson.

Also, it points to Exhibit 1 to the Motion attached to the Motion for Judgment in this suit of Arlington, which was an Order of the Circuit Court of Fairfax County an attachment, under two case captions, their Law 10501 and their attachment petition Law 11441.

Counsel for Gullo points out that the Fairfax decree recites that the lien, "The lien on the property of the Defendant Jack Anthony Gullo created by said writ of attachment issued and served upon Co-Defendant on December 21, 1962 be and the same is hereby released."

The Court's attention is directed by the moving parties to the further order of the Circuit Court of Fairfax County in Chancery 15253, a third proceeding in the court wherein it is noted that Mr. Elson was appointed Special Commissioner in 1961 and that he had given bond in September 1962; and wherein it is recited that Elson wrote on November 22, 1962 to Mr. Gullo and Mrs. Hirst the No-

tice that he would accept their offers of purchase on the property under certain conditions. Finally, it is observed that one offer was forthcoming, namely from Miriam Hirst, that the Court confirmed and ratified the sale by the Commissioner.

The evidence before me is not sufficiently clear to establish that Elson may have had some estate of the Defendant in hand. It is clear that he had no land in hand, and while it is true that the suit in Arlington focuses upon the land, nevertheless the attachment would be good if, for example, Elson had in hand an offer to buy, accompanied by a check. These would be funds relating to the land in his hand, to the estate. There is no evidence one way or the other on this point.

I accept the principles enunciated in the two cases cited by the movants in their motion. However, since it is not clear that no property of any kind was levied upon, I therefore deny to Motion for Summary Judgment, In doing so, I observe that on this motion the burden is upon the moving party to show that no funds were caught. Conversely, upon the trial of the case, in order for Gullo to make out a prima facie case, he will have to show that something was levied upon.

The principle is this: If A sues B for money alone, and loses, there can be no effective subsequent suit for malicious prosecution. Malicious prosecution under the circumstances of this case will only lie if the Plaintiff Gullo shows as part of his case in chief that either land or property was levied upon in the proceeding complained about.

PART II

The Motion for Summary Judgment is granted on this basis: I have given an earlier opinion in Part I which I will incorporate now. But the further basis is that the Plaintiff when asked what property Mr. Elson had at the time the attachment was served answered "Only what is described there."

While some question has been raised as to whether the Plaintiff had direct, personal knowledge for his answer, it is, nevertheless, his answer.

The Plaintiff, through his counsel, was offered an opportunity to show things his client has said were not so by either calling Mr. Elson (as to whom there is no evidence he was under summons), or by calling Mrs. Hirst to the stand. These were rejected. Mrs. Hirst's answer to the present suit found in Paragraph 4, Number 4 thereof, was shown to be incorrect, by the Plaintiff's own exhibits in evidence as well as by other exhibits, the authenticity of which the Defendant does not deny, namely D-5 and D-13.

Thus it appears: 1. The property was not under any attachment because the Sheriff's return shows that it was not. 2. The Fairfax Court ruling was not a litigated ruling but ancillary to dismissal of the suit. It is not binding on this Court when I can look at the record. 3. The Plaintiff offering no evidence that other property was held, then one of the necessary ingredients of wrongful attachment is missing, namely that something was attached.

For these reasons, the Motion for Summary Judgment is granted.

Opinions rendered December 13, 1978 and signed May 9, 1979.

/s/ Paul D. Brown
Judge

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT
FOR ARLINGTON COUNTY

JACK ANTHONY GULLO	:	
Plaintiff	:	
v.	:	LAW ACTION
	:	NO. 18883
BRUCE E. LAMBERT, ET-AL	:	
Defendants.	:	
	:	

JUDGMENT ORDER

"On the 12th and 13th days of December 1978, came the parties hereto with counsel and their witnesses for trial of this cause;

"WHEREUPON, the defendant Bruce E. Lambert moved the Court for leave to take nonsuit for his "crossclaim" against the plaintiff. There being no objection to said motion, the motion was granted and defendant Bruce E. Lambert's crossclaim against plaintiff was nonsuited;

"WHEREUPON, the defendants made a joint motion for summary judgment against the plaintiff and dismissal of the plaintiff's case. Each counsel made argument on said motion and the Court denied defendants' motion for summary judgment;

"WHEREUPON, the names of thirteen prospective jurors were selected and the Court and counsel inquired of said jurors as provided by law;

"WHEREUPON, each side struck three prospective jurors, after which there remained seven jurors who were thereafter duly sworn to well and truly try and determine said cause;

"WHEREUPON, counsel for each party made opening statements to the jury after which plaintiff commenced the presentation of his case by calling himself as witness to testify on his own behalf and so did testify;

"WHEREUPON, the defendants renewed their motion for summary judgment (T-151, 162,) and the Court heard argument on the renewed motion for summary judgment; after considering argument of counsel, the Court for the reasons set forth in the written opinion, granted defendants' motion for summary judgment against plaintiff, discharged the jury and dismissed the case with prejudice, it is therefore

"ADJUDGED, ORDERED AND DECREED, that for the reasons set forth in the said Opinion, judgment is that this case be and hereby is dismissed with prejudice; and

"IT IS FURTHER ORDERED that the Clerk of this Court shall forthwith provide counsel with a certified copy of this Order, and the transcript of this case is made part of this record.

"THIS ORDER IS FINAL.

Entered this 9th day of May, 1979.

/s/ Paul Brown"
Judge

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 20th day of February, 1980.

Jack Anthony Gullo, Appellant,

against Record No. 791153
Circuit Court No. L-18883

Bruce E. Lambert, et al., Appellees.

From the Circuit Court of Arlington County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:
Allen L. Lucy, Clerk

By: /s/ Richard R. Buirels
Deputy Clerk

APPENDIX E

Attachment Petition
Law No. 11441.

December 21, 1962

Virginia:

In the CIRCUIT Court of the COUNTY of FAIRFAX

MIRIAM ANNE HIRST Plaintiff,

v.

JACK ANTHONY GULLO Principal Defendant,

QUIN S. ELSON, Special Commissioner of Sale
In Chancery No. 15253 Co-Defendant,

To the Honorable ....., Judge:

Your petitioner, MIRIAM ANNE HIRST, respectfully shows unto Your Honor that the said principal defendant, JACK ANTHONY GULLO, 1330 New Hampshire Avenue, N.W., Washington, D.C., is justly and truly indebted to the plaintiff in the sum of THIRTY-FIVE THOUSAND and no/100 Dollars, which amount was (will be) due and payable December 20, 1962, the full particulars of which indebtedness are as follows:

The principal defendant did maliciously with full knowledge that the plaintiff herein had not committed bigamy and that no probable cause existed therefor swore out a warrant for her arrest charging her with the felony of bigamy, thereby causing your plaintiff special damages and entitling her to punitive damages for such wrongful and malicious prosecution in the amount of $35,000.00, all as fully set forth in plaintiff's Motion for Judgment, At Law 10501, in this Court and that the plaintiff is entitled to, or ought to recover of said principal defendant, at the least the said sum of THIRTY-FIVE THOUSAND and

NO/100 – ($35,000.00) – Dollars, with interest thereon from the 6th day of December, 1961, until paid.

Your petitioner further allege that the said principal defendant, JACK ANTHONY GULLO is not a resident of this State and has estate or debts owing to said principal defendant within the said County of Fairfax.

Intends to remove the proceeds of the sale of his property, or a material part of such estate or proceeds out of this State, so that there will probably not be therein effects of said principal defendant sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be used to obtain the judgment.

WHEREFORE, Your petitioner ask for an attachment against the estate, real and personal, of said principal defendant, JACK ANTHONY GULLO in the State of Virginia, and more particularly against the real and personal property of said principal defendant now in the possession and under the control of Quin S. Elson, Esquire, Special Commissioner of Sale, In Chancery No. 15253, GULLO v. GULLO who your petitioner prays may be made co-defendant to these proceedings and required to answer and disclose what property belonging to the principal defendant is now in his possession or under his control;

And that your petitioner may have such other, further and general relief as the nature of the case may require.

And your petitioner will ever pray, etc.

STATE OF VIRGINIA,	)	
	)	*to-wit:*
County of Arlington,	)	Miriam Anne Hirst

I, Bruce E. Lambert, a Notary Public for the State aforesaid, certify that Miriam Anne Hirst has personally appeared before me in my County aforesaid, and made oath that she is cognizant of the facts stated in the foregoing petition and that they are true.

Given under my hand this 20th day of December, 1962.

/s/ Bruce E. Lambert

APPENDIX F

Attachment
Law No. 11441
Dec. 21, 1962

THE COMMONWEALTH OF VIRGINIA,

TO THE SHERIFF OF THE COUNTY OF FAIRFAX GREETING:

MIRIAM ANNE HIRST having filed in the Clerk's Office of our Circuit Court of the County of Fairfax a petition for an attachment against JACK ANTHONY GULLO, 1330 New Hampshire Avenue, N.W., Washington, District of Columbia, and Quin S. Elson, Special Commissioner of Sale, 300 South Payne Street, Fairfax, Virginia to recover of the principal defendant JACK ANTHONY GULLO the sum of THIRTY-FIVE THOUSAND and NO/100 DOLLARS ($35,000.00) and the said petition alleging that the claim of the petitioner is believed to be just, and that the petitioner entitled to or ought to recover, at the least, the sum of THIRTY-FIVE THOUSAND and NO/100 DOLLARS ($35,000.00) with interest thereon from the 6th day of December, 1961, till paid, and that the principal defendant JACK ANTHONY GULLO is not resident of this State, and has estate or debts owing to said principal defendant within the said County of Fairfax, and that said defendant being non-resident of this State is entitled to the benefit of a lien, legal or equitable, on property, real or personal, within the County of Fairfax; and removing, or ____ about to remove, out of this State; with intent to change _____ domicile; and intends to remove, or ____ removing, or ha__ removed *specific property sued for,* his own estate, and the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that there will probably not be therein effects of the said defendant sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be used to obtain the judg-

ment; and converting, or about to convert or ha__ converted property of whatever kind, or some part thereof, into money, securities, or evidences of debt, with intent to hinder, delay or defraud ____ creditors; and ha__ assigned or disposed of, or ____ about to assign or dispose of ____ estate, or some part thereof, with intent to hinder, delay or defraud _____ creditors; and ha__ absconded, or ____ about to abscond from this State, and ha__ concealed ____ therein to the injury of ____ creditors, or _____ fugitive _____ from justice.

Therefore we command that you attach the property mentioned and sought to be attached in the said petition, to-wit: Any and all funds in the possession and under the control of the said Co-defendant, Quin S. Elson, Special Commissioner of Sale and so much of the lands, tenements, goods, chattels, moneys and effects of the said JACK ANTHONY GULLO not exempt from execution as will be sufficient to satisfy the plaintiff demand. . . and summon the said principal defendant JACK ANTHONY GULLO if they or any of them be found within your bailiwick or any county or city wherein you may have seized property under and by virtue of this writ to appear before our said Circuit Court of the County of Fairfax at the Courthouse thereof, on the 18th day of January, 1963 and answer said petition or state the grounds of his defense thereto. We further command you to summon the said Quin S. Elson, Special Commissioner of Sale co-defendant ____, to appear before our said Circuit Court of the County of Fairfax at the Courthouse on the said 18th day of January, 1963, in person and submit to an examination on oath touching ____ indebtedness to the said principal defendant ____ and the personal property of the said defendant in his possession, or with the consent of the Court, first obtained, file an answer in writing, under

oath, stating whether or not he is so indebted, and, if so, the amount thereof and the time of maturity, or whether he has in his possession any personal property belonging to the said principal defendant, and, if so, the nature and value thereof.

And that you make thereof on the said 18th day of January, 1963

Witness /s/ Thomas P. Chapman, Jr., Clerk of our said Court, at the Courthouse, Fairfax County the 21st day of December, 1962, and in the 187th year of the Commonwealth.

/s/ Thomas P. Chapman, Jr., Clerk

By: /s/ James E. Hoofnagle,
Deputy Clerk

Executed in Fairfax County, Virginia, this 21st day of December, 1962, by serving a true copy of the within Summons Attachment, part or attached affidavit on Quin S. Elson in person.

JOHN E. TAYLOR, SHERIFF

By /s/ H. Weymer Lee, Deputy

Executed in Fairfax County, Virginia, this 11th day of January, 1963, by serving a true copy of the within Attachment on Jack Anthony Gullo, in person.

JOHN E. TAYLOR, SHERIFF

/s/ H. Weymer Lee
H. Weymer Lee, Deputy

Acceptance of Service by the Principal Defendant was under protest.

A COPY TESTE:

JAMES E. HOOFNAGLE, CLERK

By: /s/ Linda J. Mill
Deputy Clerk

APPENDIX G

VIRGINIA:

IN THE CIRCUIT COURT FOR
ARLINGTON COUNTY

JACK ANTHONY GULLO 3128 Patterson Place, N.W. Washington, D.C. Plaintiff	:	LAW ACTION NO. 18883 Filed 8/20/1976
V.	:	
BRUCE E. LAMBERT 3461 N. Washington Boulevard Arlington, Virginia 22201	:	
and	:	
MIRIAM ANNE HIRST 103 Old Carriage Road Ponce Inlet Florida 32019 Defendants.	:	

MOTION FOR JUDGMENT

"1. At all times herein, Plaintiff, Jack Anthony Gullo, was and he still is, a legal owner in certain real property, known as 7516 Walton Lane, Annandale, Virginia, described as Lot 37 of the property of R. Walton Moore and Thomas R. Keith recorded in the land records of Fairfax County, Va., in Deed Book 1007, Page 519, in the name of Plaintiff, Jack Anthony Gullo, and Defendant, Miriam Anne Gullo, (Defendant herein, Miriam Anne Hirst) as tenants by the entirety.

"2. Defendant Bruce E. Lambert is an attorney and a partner of the law firm of Lambert and Lambert,

Attorneys at Law, and at all times herein mentioned has been engaged in the practice of his profession as an attorney at law in the State of Virginia and in the District of Columbia.

"3. On December 6, 1961, Attorney Jack D. Stevens of and acting for the law firm of Lambert and Lambert in the name of and on behalf of Defendant Miriam Anne Hirst, maliciously and without probable cause commenced *Civil Action No. 10501, Miriam Anne Hirst v Jack Anthony Gullo* in the Circuit Court of Fairfax County, Va. on a false, unfounded and frivolous action for malicious prosecution based on the offense of bigamy against the plaintiff, Jack Anthony Gullo, claiming damages in the sum of $35,000.00. A copy of the Motion For Judgment, *Civil Action No. 10501,* is attached hereto and made part hereof *Marked Exhibit 2.*

"4. Thereafter in furtherance of defendants' design to recover the damages, $35,000.00, on the unfounded claim alleged in *Civil Action No. 10501,* Defendant Miriam Anne Hirst with the assistance, advice, and counseling of her attorney Defendant Bruce E. Lambert together drafted the *Attachment Petition Law No. 11441, Miriam Anne Hirst v Jack Anthony Gullo et-al and Co-Defendant Quin S. Elson,* which was subscribed, sworn to and acknowledged on December 21, 1962, by Defendant Miriam Anne Hirst before her then attorney Defendant Bruce E. Lambert, a Notary Public. Thereupon Defendant Bruce E. Lambert knowing that the statements alleged in the *Attachment Petition Law No. 11441* were false, nevertheless did corruptly and illegally acknowledge the same as Notary Public to deprive plaintiff of his said property illegally.

On December 21, 1962, defendants filed the *Attachment Petition Law No. 11441* in the pending action *Law No. 10501.* A copy of the *Attachment Petition Law No. 11441* is attached hereto and made part hereof *Marked Exhibit 3.*

In the purported Verified *Attachment Petition Law No. 11441,* defendants knowingly state falsely and illegally (1) Plaintiff Jack Anthony Gullo was justly indebted to Defendant Miriam Anne Hirst in the sum of $35,000.00, due and payable December 20, 1962; (2) Plaintiff Jack Anthony Gullo intended to remove out of the State of Virginia the said real property, 7516 Walton Lane, which pursuant to defendant's direction was placed in the possession and under the control of Quin S. Elson named Co-Defendant in *Attachment Petition Law No. 11441.*

The Clerk of the Circuit Court of Fairfax County issued an attachment in accordance with the purported *Attachment Petition Law No. 11441* commanding the sheriff of Fairfax County to attach the said real property, 7516 Walton Lane, then in the possession and under the control of Co-Defendant Quin S. Elson. The said writ of attachment was duly filed and served upon Co-Defendant Quin S. Elson on December 21, 1962. A copy of the *Writ of Attachment Law No. 11441* is attached hereto and made part hereof *Marked Exhibit 4.*

"5. On February 21, 1963, defendants in violation of plaintiff's legal rights and interest in the said real property,7516 Walton Lane, caused it to be conveyed and transferred by Deed to Defendant Miriam Anne Hirst and Edwin L. Hirst, her husband. A copy of said Deed recorded in Deed Book 2258,

Page 174, in the land records of Fairfax County, Va. is attached hereto and made part hereof *Marked Exhibit 5.*

"6. On August 6, 1965, Defendant Miriam A. Hirst and Edwin L. Hirst, her husband, in violation of plaintiff's legal rights and interest in the said real property, 7516 Walton Lane, sold, transferred, and conveyed it by Deed to John F. McGill and Margaret S. McGill, his wife. A copy of said Deed recorded in Deed Book 2653, Page 143, in the land records of Fairfax County, Va. is attached hereto and made part hereof *Marked Exhibit 6.*

"7. The Circuit Court of Fairfax County, Va. denied plaintiff's motion to quash and dismiss the attachment, *Exhibit 4 supra,* on the said real property 7516 Walton Lane; and on March 6, 1968, the Supreme Court of Virginia refused plaintiff's petition for a writ of error on grounds that the order appealed from was interlocutory and not appealable under *Va. Code Title 8 Section 462.* Copies of the orders of the Supreme Court of Virginia are attached hereto and made part hereof *Marked Exhibits 7 & 7-a.*

"8. In *Jack Anthony Gullo v Miriam Anne Brown* (now Miriam Anne Hirst), *483 P2nd 293, decided 3/29/1971,* the Supreme Court of New Mexico found that Defendant Miriam Anne Hirst was never a resident of the State of New Mexico and that she practiced fraud on the New Mexico divorce court in securing the divorce decree from her former husband, John J. Brown. The New Mexico Supreme Court stated the established law of the State of New Mexico that residence for the period required by New Mexico is a jurisdictional pre-requisite to divorce in New Mexico

and that where this jurisdictional pre-requisite is lacking the divorce decree is a nullity.

"9. A trial on the merits was had on May 20, 1976, and on June 25, 1976, the Circuit Court of Fairfax County, Va. entered a final judgment dismissing the action of Defendant Miriam Anne Hirst for malicious prosecution based on the offense of bigamy, *Law No. 10501, Exhibit 2 supra,* the Attachment Petition *Law No. 11441, Exhibit 3 supra,* and Writ of Attachment *Exhibit 4 supra,* and releasing the lien on the said real property, 7516 Walton Lane, of the plaintiff created by the Writ of Attachment sued out on December 21, 1962, by defendants. A copy of this final judgment is attached hereto and made part hereof *Marked Exhibit 1.*

"10. The actions of both defendants herein in drafting and filing the Attachment Petition *Law No. 11441* and in swearing out the attachment and causing the same to be levied against plaintiff's real property, 7516 Walton Lane, as alleged in this Motion For Judgment were malicious, without probable cause, wilful, illegal, contrary to law and by reason thereof plaintiff has been deprived of his real property, 7516 Walton Lane, without any consideration and without the due process of law, and caused him great financial loss, and suffer great humiliation, embarrassment, and mental anguish and has been put to incur and expend the sum of about $20,000.00, for counsel fees, costs, and expenses, all of which has damaged and has injured plaintiff herein in the sum of $150,000.00.

"WHEREFORE, plaintiff demands judgment against defendant Bruce E. Lambert or against defendant Miriam Anne Hirst or against both defendants."

EXHIBIT H

VIRGINIA:

IN THE CIRCUIT COURT
FOR ARLINGTON COUNTY

JACK ANTHONY GULLO	:	
Plaintiff:	:	
	:	LAW ACTION
V	:	NO. 18883
	:	
BRUCE E. LAMBERT, et-al	:	
Defendants	:	
	:	

MOTION FOR SUMMARY JUDGMENT

"Come now defendants, Bruce E. Lambert and Miriam A. Hirst, by and through counsel, and respectfully move this Court to grant summary judgment in their favor and against the plaintiff, Jack Anthony Gullo, on the following grounds:

"1. This action sounds in malicious prosecution based on an underlying civil action (see paragraph 3 of plaintiff's Motion For Judgment herein), and wrongful attachment of real property (see paragraph 4 of the Motion For Judgment).

"2. A malicious prosecution action founded on an underlying civil action is only recognized in limited classes of civil actions such as ". . . maliciously attempting to throw one into bankruptcy, attachment of his person or property, proceedings to have him judged insane or put under guardianship, and the like, which are injurious to property rights of a party by assaults on his credit." *Burkes, Pleading and Practice, Section 153, at 263 (4th ed.* 1952). In

Virginia, the institution of a civil suit which does not result in arrest of the person, seizure of property, or other special injury does not furnish the basis for a malicious prosecution suit. *National Surety Co. v Page, 58* F2d 145, 148 (4th Cir. 1932), *reh. denied 54* .2d 370 (4th Cir. 1932).

"3. The rationale for precluding actions for malicious prosecution on the basis of an underlying civil action rests on the motion that the Courts should be free and open to those with grievances. Furthermore, public policy requires that there be an end to litigation and disputes should not be tried a second time under the guise of a malicious prosecution action. *Id.* Nowhere are these concerns and policy interest more apparent than in the instant case, where plaintiff has attempted to litigate the same issue over and over for more than the last 18 years.

"4. Similarly, an action for wrongful attachment cannot lie unless and until the attachment is executed, a levy has been effectuated and a proper return thereof has been made. *Harris v Lipson,* 167 Va. 365, 189 S.E. 349, 351 (1937).

"5. The mere issuance of an attachment creates no lien on real property. To be effective, the officer must have his return show that he made a levy and describe the real property with such accuracy as to cause the property to be identifiable. *Id.; Code of Virginia, Section 8-537* (1950 replacement Vol.)*

---

*At the time that the attachment was issued and returned *Section 8-537* was in effect in Virginia. *Section 8.01-534* became effective October 1, 1977.

"6. The requirement of a levy is a technical one and must be strictly followed. ". . . unless the officer acts according to the direction of the writ and in accordance with the statutes, the writ constitutes neither an attachment or a lien thereunder. The process is not of itself an attachment, but only becomes an attachment when it is properly executed. *Harris v Lipson, supra,* 189 S.E., at 351.

"7. The return on the attachment in Fairfax Circuit Court, *Attachment Petition, Law No. 11441,* clearly reflects that while the Special Commissioner of Sale was given personal service of the attachment, no levy was ever made on the real property. (attachment *In Law No. 11441,* a copy of which is attached hereto as *Exhibit I*). "The writ of attachment, before a levy thereof, has no more legal effect on the title or interest of the owner of the real estate than a mere summons or subpoena to appear in the proceedings." *Harris v Lipson, supra,* 189 S.E., at 351. Until a proper levy and return thereof has been made, the Court has no jurisdiction over the property. *Id.* A mere review of the writ and the return clearly reflect that there was no levy on any real property.

"8. Since there was no levy made on the real property at issue (see paragraph 4 of plaintiff's Motion For Judgment), there clearly was no attachment, and no action for wrongful attachment may lie. *Harris v Lipson, supra.*

"9. Furthermore, since the attachment was not effective to seize any property, no action for malicious prosecution based on an underlying civil action can lie. *National Surety Co. v Page, supra.*

"WHEREFORE, on the basis of the foregoing, defendants, Bruce E. Lambert and Miriam A. Hirst, respectfully request that this Court issue an order granting them summary judgment against plaintiff, dismiss this action, and award them their costs expended herein."

APPENDIX I

VIRGINIA:

IN THE CIRCUIT COURT
OF ARLINGTON COUNTY

JACK ANTHONY GULLO	:	
Plaintiff	:	
v.	:	LAW NO. 18883
	:	
BRUCE E. LAMBERT	:	
AND	:	
MIRIAM ANNE HIRST	:	
Defendants	;	

MOTION FOR REHEARING

Contrary to defendants' contention alleged in their Motion For Summary Judgment filed and heard December 12, 1978, that as a matter of law plaintiff's Motion For Judgment with annexed exhibits in the above entitled action fails to state a cause of action upon which relief can be granted;

Jack Anthony Gullo, Plaintiff herein, contends that the facts alleged in his Motion for Judgment state the following causes of actions upon which relief can be granted against Defendant Bruce E. Lambert; or against his client, Defendant Miriam Anne Hirst; or against both:

1. Va. Code Title 8.01 Section 568
2. Va. Code Title 8.01 Section 41
3. Va. Code Title 20 Section 107
4. Abuse of Process
5. Conversion
6. Due Process of Law

7. Liability of Attorney While Acting as Notary Public. Knowingly Certifying False Statements of His Client.

8. Liability of Notary Public – Va. Code Title 47 Section 3

Plaintiff's said Motion For Judgment with the annexed exhibits thereto marked No. 1 to 7a state facts showing that defendants without probable cause did maliciously, wilfully, wrongfully, and illegally, attach, take, convert, and sell that much (one-half) of the property,* 7516 Walton Lane, Annandale, Fairfax County, Va., of Jack Anthony Gullo solely for their own use and benefit thereby depriving and taking his property without the due process of law.

2.

Further, defendants together engaged in and did commit perjury, when defendant Bruce E. Lambert, attorney for his client Defendant Miriam Anne Hirst, while acting as Notary Public certified that certain material statements made by his client Miriam Anne Hirst in the *Attachment Petition Law No. 11441* were true in order to give it the appearance of having complied with the requirements of the statute providing for attachments when he and his client Miriam Anne Hirst then had full knowledge of their falsity for the purpose of which was to issue the attachment on false suggestions; a purpose not justified by law; and to make such statements as to influence the courts in ruling, inter-alia, against Plaintiff's Motion To Quash the said Attachment.

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*Upon the entry of the divorce decree, In Chancery No. 15253, Gullo v. Gullo, Jack A. Gullo became the owner of physically undivided part of the entire property described in the said divorce decree, Chancery No. 15253, *Title 20* - Sections 107,111; *Watson v Mose, 183 S.E. 428 (Va); Guy v Guy 210 Va 536.*

3.

The Judgment entered on June 25, 1976, in the principal *Civil Action No. 10501* and *Attachment Law No. 11441* in favor of Jack Anthony Gullo upon a trial on the merits on May 21, 1976, by the Circuit Court of Fairfax County, Va., in Miriam Anne Hirst, Plaintiff vs. Jack Anthony Gullo and Joe S. Gullo Defendants, and Quin S. Elson Commissioner of Sale *In Chancery No. 15253, Gullo vs Gullo,* Co-Defendant, is conclusive proof that the attachment was wrongful; that the property was wrongfully taken; that the lien on the property of Jack Anthony Gullo created by the Writ of Attachment issued and served upon the Co-Defendant on December 21, 1962, was released; that Miriam Anne Hirst had no meritous cause of action against Jack Anthony Gullo; and that all issues of law and fact pleaded and raised in the former *Civil Action No. 10501* have been determined and are res-judicata. The said Judgment entered June 25, 1976, is incorporated herein and made part hereof by reference.

Certificate of Service

I hereby certify that I mailed, postage prepaid, a copy of the foregoing Motion For Rehearing this 8th day of January, 1979, to David Barzak, Esq., 4085 Chain Bridge Road, #203, Fairfax, Virginia, 22030, attorney for defendant Miriam Anne Hirst; and James L. Rider - William F. Krebs, attorneys for Bruce E. Lambert, 3461 North Washington Blvd., Arlington, Virginia 22201.

/s/ Joseph S. Gullo
Joseph S. Gullo

Supreme Court, U. S.
FILED
JUN 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1755

JACK ANTHONY GULLO,
Petitioner,

v.

BRUCE E. LAMBERT
and
MIRIAM ANNE HIRST,
Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Arlington County of the Seventeenth Judicial Circuit of the State of Virginia

---

BRIEF FOR RESPONDENTS IN OPPOSITION

JAMES L. RIDER
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Counsel for Respondents

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IN THE

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On Petition for Writ of Certiorari to the Circuit Court of Arlington County of the Seventeenth Judicial Circuit of the State of Virginia

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the judgment below was sustained on sufficient grounds; that no Federal question has heretofore been raised, and that Petitioner was not deprived of any rights guaranteed by the United States Constitution. This honorable Court should not take jurisdiction and should not grant

a Writ of Certiorari to review the final order of the Circuit Court of Arlington County of the Seventeenth Judicial Circuit of the State of Virginia entered in the above entitled cause on May 9, 1979.

OPINIONS BELOW

The opinion delivered in the Court below is not and will not be officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was rendered on December 13, 1978; the final Order entered on May 9, 1979; a Motion for Rehearing was denied in January, 1979; and the Supreme Court of Virginia denied a Petition for a Writ of Error on February 20, 1980.

JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. 1257 (c). Under that statute, there must be a Federal question in order to evoke the jurisdiction of the Supreme Court and the Federal question must have been raised in a proper and timely manner in the State Courts. If the record as a whole shows, either expressly or by clear intendment, that this was not done, the claim is to be regarded as not having been adequately presented and thus, this Court should not review the issue. In this case, the judgment of the Circuit Court of Arlington County was to the effect that under Virginia state law, a malicious prosecution action for wrongful attachment of property will not lie when there is not a valid levy on the property and hence, no attachment. At no time was the issue of the validity of the Virginia statute permitting attachment before judgment adjudicated. Therefore, the constitutionality of such

statute was not raised before the Trial Court and Petitioner herein wrongfully evokes jurisdiction under 28 U.S.C. 1257(c). This honorable Court does not have jurisdiction to hear and determine this matter.

QUESTIONS PRESENTED FOR REVIEW

Petitioner misstates the nature of the legal issue or issues sought to be reviewed and raises for the first time certain constitutional issues. These constitutional issues now being raised are whether the Trial Court's decision granting Respondent's Motion for Summary Judgment and dismissing Petitioner's action for malicious prosecution wrongfully deprived the Petitioner of his property without due process of law as is guaranteed to him by the 14th Amendment to the Constitution of the United States.

Further, Petitioner is asking this honorable Court to review the issue of whether the dismissal of the attachment petition pursuant to the judgment rendered in the main action by Order of the Circuit Court of Fairfax County, entered June 25, 1976 (Pet. for Cert. 4-5.) was a decision as to the veracity and validity of the Writ of Attachment and Levy such as to render the question of veracity and validity *res adjudicata*; and, whether such dismissal thereupon constituted a wrongful taking of Petitioner's property in violation of the due process and just compensation guarantees of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

". . . Nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

Constitution of Virginia, Article 1, Section 11

". . . that no person shall be deprived of his life, liberty or property without due process of law; . . ."

STATEMENT OF THE CASE

The decision in the Trial Court was rendered with respect to the Petitioner's suit against the Respondent for malicious prosecution based upon a contention that the Respondents had wrongfully attached Petitioner's property and caused him to suffer damages. The attachment the Petitioner referred to had been made pursuant to an action brought by Respondent, Miriam Anne Hirst, in the Circuit Court of Fairfax County, Virginia, against the Petitioner, Jack Anthony Gullo. That suit was decided not in favor of Respondent Hirst, for the reason that a specific amount of dollar damages had not been satisfactorily proven. When judgment was entered in the Fairfax County main action, the Writ of Attachment and Levy were dismissed as a matter of course. Pet. for Cert. 4-5.

In the case sought to be reviewed by this honorable Court, Respondents made a Motion for Summary Judgment at the outset of the trial. The motion was predicated upon the fact that there had not been a valid levy upon Petitioner's real property pursuant to the attachment since the Sheriff's return did not specifically describe the land sought to be attached as was required by the *Code of Virginia,* Section 8-537, 1950 Replacement Volume. Such Motion for Summary Judgment was denied because although the Trial Court found that there was no levy upon land, there still remained a question as to whether there was any property belonging to the Defendant which could have been subject to the levy. TR. 69-72, December 12, 1978.

During the course of the trial, the Petitioner testified that the only property located in the Commonwealth of Virginia that he was possessed of at the time the levy was made, was a certain parcel of real estate. Whereupon the Respondents renewed their original Motion for Summary Judgment, TR. 151-152, December 13, 1978, which Motion was granted.

The Petitioner then filed a Petition for Writ of Error to the Supreme Court of Virginia which Court denied such Writ on February 20, 1980.

REASONS FOR DENYING THE WRIT OF CERTIORARI—ARGUMENTS

I. The Court does not have jurisdiction to entertain the Petition.

Petitioner's action in the Circuit Court of Arlington, Virginia, asked for damages allegedly suffered by reason of an alleged wrongful attachment of property. The Circuit Court granted the Respondents' Motion for Summary Judgment upon the Court's finding that there was not a valid levy on any real property and after Petitioner testified that his only property in Virginia was a certain parcel of real estate.

Throughout the proceedings in the Circuit Court, Petitioner made no claim for damages on constitutional grounds. Further, Petitioner made no attack on the constitutionality of the Virginia statute permitting attachment before judgment or of the constitutionality of the Court's Order. Nor did Petitioner base his Assignments of Error in the Supreme Court of Virginia on constitutional grounds. And in fact the assignments failed to draw in any question of the constitutional validity of any statutes as is required by 28 U.S.C. 1257(c).

Furthermore, the State Supreme Court, by its order refusing the Writ of Error, declared that upon consideration of the record, it was of opinion that the judgment below was plainly right. *Bailey* v. *Anderson,* 326 U.S. 203, 206, 66 S. Ct. 66, 90 L. Ed. 3.

On this record it cannot be said that the Supreme Court of Virginia, by denying the Writ of Error, passed upon any question of the constitutionality of the Virginia attachment statute not raised or passed on by the Trial Court below and unless this affirmatively appears to be the case upon the record brought to this Court for review on Writ of Certiorari, then this Court is without jurisdiction to hear the matter and the Petition for the Writ of Certiorari must be dismissed for want of any properly presented substantial Federal question. *Bailey* v. *Anderson, supra, Jacobi* v. *State of Alabama,* 187 U.S. 133, 135-136, 23 S. Ct. 48, 49, 47 L. Ed. 106.

The purpose of the statutory provision depriving the United States Supreme Court of jurisdiction unless there was drawn in question before the state Supreme Court the validity of a statute of the state on the grounds of its being repugnant to the Constitution or laws of the United States, is to restrict mandatory jurisdiction. *Memphis Natural Gas Company* v. *Beeler,* 315 U.S. 649, 651, 62 S. Ct. 857, 859, 86 L. Ed. 1090.

Further, no judgment of a state court can be reviewed by the United States Supreme Court unless the state Supreme Court has first been apprised that a state statute is being assailed as invalid on Federal grounds. *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U.S. 182, 185-186, 65 S.Ct. 624.

This jurisdictional requirement is satisfied only if the record shows that the question of the validity under Federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, *Wall* v. *Chesapeake & Ohio RR. Co.*, 256 U.S. 125, 126, 41 S.Ct. 402, 403, 65 L.Ed. 856; or has in fact been decided by it. *Nicky* v. *Mississippi*, 292 U.S. 393, 394, 54 S.Ct. 743, 78 L.Ed. 1323.

The record in this case does not disclose that at any time in the course of the proceedings in the Virginia state courts Petitioner asserted the invalidity of a state statute on any Federal ground.

The Motion for Judgment in the Circuit Court of Arlington County, Virginia, alleged only that the Writ of Attachment obtained by Respondents in Fairfax County, Virginia, deprived Petitioner of his property and caused him to suffer damages.

Since the record does not show that the Petitioner presented for decision to the Supreme Court of Virginia any Federal question, and since the Supreme Court of Virginia did not rule on the validity of the Virginia attachment statute, a Writ of Certiorari cannot be obtained from the Supreme Court of the United States. *Wilson et al.* v. *Cook*, 327 U.S. 474, 481, 66 S.Ct. 663, 9 L.Ed. 793.

II. The dismissal of the Writ of Attachment by the Circuit Court of Fairfax County, Virginia, was ancillary to the judgment rendered by that Court in the main cause of action; was not a decision as to the veracity, validity and/or constitutionality of the Attachment Petition itself; and hence the issue of the veracity, validity and/or of the constitutionality of the attachment and levy is not *res adjudicata*.

The rule of *res adjudicata* is applied only in situations where there has been a determination of a given question. Adjudication of a question, essential to former adjudication or *res adjudicata,* is the deliberate action of the Court upon that question, 8B MJ, Former Adjudication or *Res Adjudicata,* § 9; *Hauck* v. *Kerfoot,* 99 Va. 659, 39 S.E. 590. Generally, the adjudication of any question implies the submission of that specific question to a Court of Record. *Pritt* v. *W.V. Norfolk R. Co.,* 132 W.Va. 184, 5 S.E.2nd 105. It is clear from the statement of this case that the ruling in the Circuit Court of Fairfax County went to the issue of damages in a malicious prosecution case. When such damages were not shown with specificity, the Court dismissed the suit and the Writ of Attachment. The issue of the veracity, validity and/or of the constitutionality of the attachment petition itself, and the attendant levy was never specifically addressed by the Court and hence such issue is not *res adjudicata.*

III. An invalid levy on real estate cannot be the basis for an action for malicious prosecution or the basis for an allegation of a wrongful deprivation of property in contravention of the due process clause of the Constitution of the United States of America.

A malicious prosecution action founded on an underlying civil action is recognized only in limited classes of civil actions such as maliciously attempting to throw one into bankruptcy; attachment of his person or property; proceedings to have him adjudged insane or put under guardianship; and the like, which are injurious to property rights of a party by assaults on his credit. Burks, *Pleading and Practice,* § 153 at 263, 4th Ed., 1952. In Virginia, the institution of a civil suit which does not result in arrest of the person,

seizure of property, or other special injury does not furnish the basis for a malicious prosecution action. *National Surety Co.* v. *Page,* 58 F2nd 145, 148 (4th Cir. 1932), reh. den. 54 F2nd 370 (4th Cir. 1932).

Similarly, an action for wrongful attachment cannot lie unless and until the attachment is executed, a levy has been effectuated and a proper return thereof has been made. *Harris* v. *Lipson,* 167 Va. 365, 189 S.E. 349, 351 (1937).

The requirement of a levy is a technical one and must be strictly followed. Unless the officer acts according to the direction of the writ and in accordance with the statutes, the writ constitutes neither an attachment nor a lien thereunder. The process is not of itself an attachment, but only becomes an attachment when it is properly executed. *Harris* v. *Lipson, supra,* 189 S.E., at 351.

The Sheriff's return on the attachment petition in question did not give any description of the real property on which a levy was sought to be made and hence it is clear that no valid levy was ever made on Petitioner's real property. The Writ of Attachment, before a levy thereon, has no more legal effect on the title or interest of the owner of the real estate than a mere summons or subpoena to appear in the proceedings. *Harris* v. *Lipson, supra,* 189 S.E. at 351.

Until a proper levy and a return thereon has been made, the Court has no jurisdiction over the property and the owner is not deprived of any property rights and therefore could not at some later date state that he was deprived of the property without due process and in violation of his rights as guaranteed under the United States Constitution, *Id.*

Since there was no effective levy made on the real property owned by the Petitioner, there clearly was no attachment, and no action predicated upon a wrongful attachment may lie. *Harris* v. *Lipson, supra.*

Furthermore, since the attachment was not effective to seize any property, no action for malicious prosecution based on the underlying civil action can lie. *National Surety Co.* v. *Page, supra.*

PETITIONER'S AND RESPONDENTS' AUTHORITIES DISTINGUISHED

Petitioner states at page 5, Pet. for Cert., that all questions of fact and law respecting the attachment petition were determined by a final Order entered June 5, 1976, and are now *res judicata.* His interpretation of 2A, MJ, Attachment and Garnishment, § 82, and of Burks Pleading and Practice, 4th Ed. Judgments, Res Adjudicata and Estoppel by Judgment, § 357, is erroneous for the reason those while that sections refer to forever putting to rest the key issues, which formed the basis of the attachment petition, they in no way refer to a final adjudication of either the validity or the constitutionality of the attachment petition when those issues were not put before the Court for judicial resolution.

A discussion of the actual meaning of res judicata has been made in the section entitled Argument herein.

Further, in his Statement, Petitioner cites as the basis for bringing his malicious prosecution action in the Circuit Court of Arlington County, Code of Virginia, 8.01-41 and 8.01-568. These sections provide for damage awards to an owner of property which has been wrongfully seized or where the claim of the Plaintiff

has not been established. Neither of these actions were relevant in the Trial Court decision once the Trial Court established that there had never been a valid levy on Petitioner's property. However, regardless of the issue as to the effectiveness of the attachment, it is patently clear that the attachment petition was founded on Respondent Hirst's valid claim for damages in excess of the value of Petitioner's property and because Respondent Hirst knew that Petitioner resided without the State of Virginia and therefore believed he intended to remove all his property to without the State of Virginia. Further, the transcript of the main decision indicates that the Respondent did in fact establish a basis for malicious prosecution. However, a decision was not entered in her favor because a specific amount of dollar damages was not proved.

It is interesting to note that Petitioner relies upon the case of *Persinger* v. *Edwin Associates, Inc.,* 230 S.E.2d 460 (W.Va.) to support his argument that he was deprived of due process since that case clearly states that the West Virginia attachment statute, which is nearly identical to the Virginia statute, provides specialized protections to a Defendant which serve to establish the constitutionality of those procedures in context of the due process requirements. The case also specifically states that if an Affidavit, which contains factual claims is filed and an Order of Attachment is issued by the Clerk, upon a determination that statutory mandates have been met, the same is consistent with due process. Thus, this case supports the action of the Respondents and in no way substantively bolsters Petitioner's Petition for a Writ of Certiorari.

Finally, Petitioner asserts in his Reasons for Granting the Writ that the Trial Court denied Petitioner

a fair trial. To this end, it is to be noted that Petitioner filed an Action, was granted a jury trial, and a decision was rendered by a Court of competent jurisdiction. At no time has there ever been a showing that any member of the bench or bar violated any provision of the Virginia Code of Professional Responsibility or that Petitioner was denied a fair trial. Certainly, if this had been the case, the Supreme Court of Virginia would have granted Petitioner's Writ of Error.

CONCLUSION

Respondents have shown clearly that no Federal question has been raised during the trial of this case such as would give this honorable Court jurisdiction to hear and review this matter. However, even absent this fatal jurisdictional defect, it is convincingly evident that the Trial Court's decision was sustained on sufficient grounds and could not possibly be reversed within any ambit of sound judicial reasoning.

Therefore, we respectfully request that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. Rider, one of the Attorneys for the Respondents herein, and a member of the Supreme Court of the United States, hereby certify that on the 5th day of June, 1980, I served three copies of the foregoing Respondents' Petition in Opposition to Writ of Certiorari in a duly addressed envelope, with postage prepaid, to Joseph S. Gullo, Esquire, Counsel for Petitioner, at his address of record: 5899 First Street, South, Arlington, Virginia 22204.

/s/

JAMES L. RIDER